IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 18-08-2007

CORAM :

THE HONOURABLE MR. JUSTICE A. KULASEKARAN

W.P. No. 24925 of 2006
and
M.P. No. 2 of 2006

M/s. URC Construction (P) Ltd
rep. By its Executive Director
S. Palanisamy
H-102, Periyar Nagar
Erode - 630 001 .. Petitioner

Versus

1. Bharat Heavy Electricals Limited
rep. By its Managing Director
BHEL House, Siri Fort
New Delhi - 110 049

2. Bharat Heavy Electricals Limited
rep. By its Senior Dy. General Manager
Power Sector - Southern Region
No.474, Anna Salai
Nandanam, Chennai - 600 035

3. Bharat Heavy Electricals Limited
rep. By its Senior Manager
Power Sector - Southern Region
HPCL, Visakh Refinery
Malkapuram Post
Visakapatnam - 530 011 .. Respondents

Petition filed under Article 226 of The Constitution of India praying for a Writ of Certiorari as stated therein.

For Petitioner : Mr. A.L. Somayaji, Senior Advocate
for Mr. V.P. Sengottuvel
For Respondents : Mr. Ramachandran, Senior Advocate
for Dr. Anita Sumanth

ORDER

The petitioner has come forward with this writ petition praying for a Writ of Certiorari to call for the entire records of the respondents which culminated in the impugned proceedings of the third respondent in Ref.BHEL/HPCL/CVL/101 dated 27.07.2006 and quash the same as illegal.

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2. The petitioner company is one of the engineering contractors. The respondents herein invited tenders for the work of construction of civil and structural work for CPP expansion project at HPCL, Visakapattinam in which the petitioner company has participated and became successful and the work order was also issued by the second respondent to the petitioner on 09.09.2004. The time granted for completion of the work was 10 months. According to the petitioner, the respondents delayed in releasing the drawings, work front etc., and therefore, they could not complete the work in time. It is the case of the respondents that the delay is on the part of the petitioner in mobilising its resources in time, which has affected the work progress. The petitioner approached the respondents by way of representation dated 05.05.2006 alleging that due to the delay in releasing the work front to it by the respondents and due to heavy rain in Vizag, the work could not be completed within the stipulated time or extended time, in the meanwhile huge increase in the price of construction materials and gave two options for completion of the work entrusted to them. Subsequently, the petitioner and the respondents had a meeting at Chennai and the relevant portion of the discussions recorded in the minutes of the meeting held on 16.05.2006 is extracted below:-

> "BHEL further stated that the project is to be completed as per the commitment made to customer hence we have come to an understanding how to complete the work. As URC is expressing the financial burden on the works, BHEL suggested that the area of work where URC is doing at present can be continued and the balance work can be executed by BHEL through alternative arrangements as per the provision of Contract. The area of the work are listed in the Annexure and requested URC to arrange the materials and labour to complete the said works in all respects with in 30.06.2006 to facilitate BHEL to carry out further erection work. BHEL also repeated URC to carry out all the balance piling works and structural steel works (Fabrication & Erection)
>
> URC agreed for the above but are not accepting for any liability due to the above alternative arrangements. If BHEL shall not press and put the liability, URC has agreed to withdraw all the claims proposed so far on BHEL and also will not raise any future claims in respect of the Contract SCT 1100. M/s. URC further requested BHEL to make the pending payments at the earliest.
>
> The above will be implemented only after the approval of Competent Authority of BHEL."

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3. Mr. A.L. Somayaji, learned senior counsel appearing for the petitioner submitted that in the meeting held on 16.05.2006, the petitioner has categorically stated that the works mentioned in Annexure-I alone would be completed by them, rest of the works can be allowed to be completed by the respondents through third party agency as they suggested, for which the petitioner has agreed, however, while giving such consent, it is stipulated by the petitioner that they are not accepting any liability due to the above alternative arrangement of engaging third party agencies for completion of other works except the works mentioned in the Annexure I of the minutes; that after the said meeting and after approval of the minutes by higher authority, the respondents sent a letter dated 05.06.2006 requesting the petitioner to complete the works which are listed in Annexure I to the minutes of the meeting dated 16.05.2006, which amounts to concurrence for the agenda of minutes including one of the conditions of not accepting the liability when third party agencies are engaged to complete the rest of the work. It is further submitted by the learned senior counsel for the petitioner that by the conduct of the parties, the dispute has been settled and thereafter, the respondents also allowed the petitioner to complete the works mentioned in Annexure-I, which was also executed, hence, no dispute at all for adjudication and prayed for allowing of the writ petition.

4. Mr. Ramachandran, learned senior counsel appearing for the respondents submitted that in the meeting held on 16.05.2006 certain discussions were made by the petitioner and the respondents but nothing was concluded, particularly the conditions stipulated by the petitioner that the petitioner cannot be made liable for consequences of executing the other works by third parties and that the petitioner has misconceived the wordings contained in the minutes of the meeting and filed the present writ petition and that the contract between the parties contains arbitration clause, the dispute involved in this case has to be adjudicated only by the arbitrator, hence, the writ petition filed, seeking the discretionary relief is not maintainable.

5. This Court carefully considered the argument of the counsel for both sides and perused the material records. It is admitted by both sides that after the meeting dated 16.05.2006, the only communication sent by the respondents was dated 05.06.2006, which is extracted below:-

> "Please find enclosed herewith the copy of MOM drawn between BHEL & M/s. URC Constructions (P) Ltd., for the meeting held at Chennai on 16.05.2006 along with the list of works to be carried out by M/s. URC before 30.06.2006, which is shown as Annexure-I to MOM dated 16.05.2006.
>
> You are requested to take necessary action to complete the works as in Annexure-I to MOM dated 16.05.2006 without fail. In the event of not completing the works for any reason, BHEL shall complete the same at your cost and risk.

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This is for your information please."

6. In and by the said communication, the respondents referred to the MOM dated 16.05.2006 and mentioned the annexure-I wherein the works to be carried out by the petitioner were found mentioned and requested to take necessary action to complete the said works without fail, in the event of not completing the works for any reason, it was informed that they would complete the same at the cost and risk of the petitioner. It is stated by the petitioner that the said letter dated 05.06.2006 was sent after the MOM was approved by the competent authority of the respondents, which was not specifically denied by the respondents in their counter.

7. A joint reading of the letter dated 05.06.2006 of the third respondent along with the minutes of the meeting dated 16.05.2006 makes it clear that the respondents agreed to permit the petitioner to complete the works mentioned in Annexure-I without reserving their right to make any claim against the petitioner relating to liability, if any arise when third parties are engaged for carrying out rest of the works. It is further mentioned in the MOM that if the respondents not press or shift the liability on the petitioner, the petitioner agreed to withdraw all claims proposed against the respondents and also not raise any future claim in respect of the contract. While stipulating the said condition, the petitioner requested the respondents to make the pending payments at the earliest. In the letter dated 05.06.2006 the respondents unconditionally requested the petitioner to complete the works mentioned in Annexure-I of MOM, hence, the respondents cannot approbate and reprobate because on whom certain benefit is conferred has option either to accept or to reject, cannot do both in respect of the very same transaction.

8. In view of the above discussion and the fact that the respondents, by their letter dated 05.06.2006 elected to agree the MOM thereby prevented the petitioner from claiming any damages against them and permitted the petitioner to complete the works mentioned in Annexure-I, re-opening the settled things, that too after passage of time by issuing the impugned proceedings dated 27.07.2006 is untenable in law, hence, the same is liable to be quashed and accordingly it is quashed.

9. In the result, the writ petition is allowed as prayed for. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Asst. Registrar.

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Sub Asst. Registrar.

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To

1. The Managing Director
   Bharat Heavy Electricals Limited
   BHEL House, Siri Fort
   New Delhi - 110 049

2. The Senior Dy. General Manager
   Bharat Heavy Electricals Limited
   Power Sector - Southern Region
   No.474, Anna Salai
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   Bharat Heavy Electricals Limited
   Power Sector - Southern Region
   HPCL, Visakh Refinery
   Malkapuram Post
   Visakapatnam - 530 011

1 cc to Mr.V.P.Sengottuvel, Advocate, SR. 52053
1 cc to Mr. Anita Sumanth, Advocate, Sr. 51890

WP No. 24925 of 2006

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